Supreme Court U. S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROSALIE M. ARLINGHAUS, individually and as Executrix of the Will of Frank H. Arlinghaus, deceased,

Petitioner,

v.

J. RICHMOND RITENOUR and JOHN J. LIPSKY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND P. O'KEEFE
CHARLES A. SCHARF
GEORGE C. BECK
CHARLES A. SCHARF, P.C.
60 East 42nd Street
New York, New York 10017
(212) 986-4141

Counsel for Respondents

October 24, 1980

QUESTIONS RESTATED BY RESPONDENTS

1. Did the Court of Appeals err in ruling that a finding of the District Court adverse to a former co-defendant, who was unrelated to the Appellees and not a party to the appeal, may be set aside where:

(a) the Appellees did not attack the finding by filing a cross-appeal since the Appellees argued to sustain the decision of the District Court without in any way enlarging or changing Appellees' rights under the decision;

(b) the Court of Appeals requested the parties to file a third series of briefs on the finding and such briefs were before the Court of Appeals at the time of its

decision; and

(c) the setting aside of the finding does not affect the integrity of the judgment, or any part thereof, entered by the District Court, which remains inviolate under alternative grounds of liability and because the Petitioner settled with the co-defendant prior to appeal?

2. Did the Court of Appeals err in holding that Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder were not violated, since the Appellees did not make any untrue statement of a material fact to the Petitioner or omit to state a material fact to the Petitioner?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

To induce this Court to grant review of the opinion of the Court of Appeals for the Second Circuit unanimously affirming the District Court for the Southern District of New York, the Petitioner, Arlinghaus, has distorted the record and misinterpreted the law and the opinions of both the District Court and of the Court of Appeals. Rather than state the questions for review in the circumstances of the case as required by Sup. Ct. R. 40, the Petitioner has fabricated questions which she hopes will be reviewed by this Court, but which have no relevancy to the actual facts and circumstances of this case.

As required by Sup. Ct. R. 40,

Respondents, Ritenour and Lipsky, herewith submit questions, restating those submitted by the Petitioner to at least conform the alleged questions to the circumstances of the case. Respondents argue, however, that no questions exist in this case which should be reviewed by this Court.

The facts in the case found by the District Court and the Court of Appeals are set forth in the Appendix to the Petition* (App. 56-71; and App. 6-27, respectively). Contrary to Petitioner's contentions, Respondents, Ritenour and Lipsky, are not attacking any of these findings of fact of the District Court. As discussed further below, the Petitioner's entire argument that the

*Appendix to the Petition is hereinafter referred to as "App."

Respondents were required to file a cross-appeal from the District Court's judgment in Respondents' favor is based upon a conclusory finding of the District Court, a finding limited to an unrelated co-defendant, Pepper. The District Court found that Pepper, who was the attorney for the Petitioner, was liable for the breach of his fiduciary duty as the attorney for the Petitioner. Whether Pepper would have appealed the specific finding of the District Court of his knowledge of a $2,000,000 to $3,000,000 "probable value" will never be known. The question was rendered moot by the Petitioner when she took $175,000 from Pepper in settlement and, as the Court of Appeals found, rendered the judgment against Pepper inviolate (App. 42-3).

In accordance with Sup. Ct. R. 40, Respondents deem it necessary to call to the Court's attention inaccuracies in the "Statement of the Case" by the Petitioner as follows:

1. Petitioner states (Petition, 8) that the Respondents agreed to form a syndicate with Pepper to acquire Petitioner's stock. In Petitioner's anxiety to tie Respondents to Pepper she misstates the record which clearly reflects that the Respondents did not join with Pepper but refused to do so, as found by the District Court:

> "Pepper requested that as part of the plan he be allowed to purchase stock as well. Although Ritenour and Lipsky were cool to the idea of Pepper buying into "their" company, they knew that the stockholders had

a right to sell to anyone. They made it clear to Pepper that they intended to purchase 30% of the stock; what he arranged was his business" (App. 66-7).

2. Petitioner states (Petition, 9) that neither Ritenour nor Lipsky "or anyone else" told Mrs. Arlinghaus of the existence of ongoing negotiations. Again, the record reflects just the opposite. Petitioner, as the Executrix of the estate of her husband, instituted the efforts to sell the Company to pay estate taxes. Ritenour and Lipsky were designated by the Board of Directors to make the sale. As late as June 14, 1967 the Board authorized Ritenour and Lipsky to retain a financial consultant (App. 19). The record is clear

that Ritenour regularly reported to the Board of Directors (App. 60). The District Court found:

> "Ritenour routinely reported the fact and results of such meetings to the board of directors and to Pepper, as counsel to the corporation and to the corporation's majority stockholders."

Clem Arlinghaus, the brother-in-law of Petitioner, sat on the Board of Directors. The record is clear that Petitioner discussed the valuation of the stock in connection with a Buy-Back Agreement between the estate and the corporation with her brother-in-law, Clem, and Sidney Pepper in making her counter-offer to the syndicate.

3. Petitioner misstates the opinion of the District Court by stating the Court held that Pepper

had failed "to disclose to Mrs. Arlinghaus that Ritenour and Lipsky had determined during their merger negotiations that Teleservice had a probable corporate value of between $2,000,000 and $3,000,000" (Petition, 11).

The District Court did not hold that Ritenour and Lipsky had made any such determination. Rather, the record is clear that Ritenour and Lipsky could not reasonably have believed that Teleservice had such a value, and the Court of Appeals specifically so found (App. 34-5,39):

"We need not decide this, however, since we find nothing in the record to show that prior to the July, 1967 agreements

Ritenour and Lipsky had sufficient reason to believe that Teleservice could command a sales price substantially in excess of $20 per share ($1,117,600 for the 58,800 shares), the price which Mrs. Arlinghaus proposed in the never consummated syndicate deal and which would have to be realized in order to prevent rescission of the in-house deal, see footnote 7 supra, to require direct disclosure to Mrs. Arlinghaus under the principles laid down in the cases just cited" (emphasis supplied).

"Although Ritenour and Lipsky may have hoped for such an offer in July, 1967, we find nothing in this history to suggest that they had learned any facts sufficiently indicative of Teleservice's true value, as later developed, to require them either under the common law of New York or under Rule 10b-5 to seek out Mrs. Arlinghaus and expressly advise her that Teleservice's value might far exceed the $20 per share she had been willing to accept from the syndicate and was assured of obtaining for her entire holdings under the July, 1967 agreements."

4. The Petitioner (Petition, 14) again distorts the record and deliberately misstates the holding

of the Court of Appeals with respect to the District Court opinion:

> "...the Court of Appeals ruled that the District Court had erred in its finding that Ritenour and Lipsky had knowledge that Teleservice's probable corporate value was between two and three million dollars (the 'Finding of Fact')" (emphasis supplied). Id.

The District Court found in its Conclusions of Law (App. 77) as an alternative and subsidiary ground for finding Pepper liable that Pepper had not fulfilled his fiduciary duties as attorney to Petitioner and the Arlinghaus estate by concealing a probable corporate value of two to three million dollars. The conclusion of law of the District Court was directed solely at Pepper's liability. The District Court did

not find that Ritenour and Lipsky had knowledge of any such probable value of Teleservice.

Throughout Petitioner's Statement of the Case, by use of a non sequitur, Petitioner desperately argues that the District Court held that Respondents, Ritenour and Lipsky, believed that Teleservice had a "probable" value of $2,000,000 to $3,000,000. As has been demonstrated from the record, the District Court did not so find, and after a thorough briefing by both the Respondents and the Petitioner on this point in a third series of briefs based on the entire record, the Court of Appeals found just the opposite (App. 5-6; App. 34-5; App. 39).

ARGUMENT

POINT ONE

THIS COURT SHOULD DENY THE PETITIONER'S PETITION FOR CERTIORARI SINCE IT IS CLEAR THAT THE COURT OF APPEALS IN SUSTAINING THE JUDGMENT OF THE DISTRICT COURT PROPERLY CONSIDERED THE RECORD. NO ISSUE EXISTS THAT WARRANTS THIS COURT'S GRANT OF CERTIORARI.

A. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT. RESPONDENTS WERE NOT REQUIRED TO CROSS-APPEAL. THE COURT OF APPEALS HAD THE POWER TO REVIEW THE ENTIRE RECORD.

Although Respondents Ritenour and Lipsky did not file a cross-appeal in this case, Judge Friendly, writing for the unanimous Court of Appeals, affirmed the District Court's favorable judgment and incidentally corrected one of the lower court's conclusions. Petitioner suggests that the Court of Appeals has thus "distorted" the Langnes

rule (Petition, 20).

The Court of Appeals correctly applied the Langnes rule. That long-established rule recognizes the power of a reviewing court to sustain a part or all of a trial court's judgment upon any grounds supported by the record. Langnes v. Green, 282 U.S. 531 (1931). In responding to cases cited as limiting the scope of review to those issues raised by cross-petition, the Langnes Court made explicit its power of complete review. The Court emphasized that no case denied "the power of the court to review objections urged by respondent, although he has not applied for certiorari...." Id. at 536-38. The Court also noted that the Respondent sought to reverse the lower court's adverse conclusion "not to overthrow the decree, but to sustain

it," Id.; and cited United States v. American Ry Express Co., 265 U.S. 425 (1924), to support the point.

Subsequent decisions of this Court stated exceptions to the Langnes rule.* None of these decisions, however, apply to the present case. The power of the Court of Appeals to review conclusions of fact and law fully is unquestioned when the appellate court is sustaining a lower court decision.

Petitioner refers to "confusion"

*The Langnes exceptions require appellees to cross-appeal when a judgment disposes of separate claims, one or more of which appellee seeks to reverse, Helvering v. Pfeiffer, 302 U.S. 247, 250-51 (1937); before appellee raises an improper venue defense, Peoria & Perkins Union Railway v. U.S., 263 U.S. 528, 536 (1924); and before appellee raises statute of limitations issues, Alaska Industrial Board v. Chugach Electric Association, Inc., 356 U.S. 320, 324-25 (1958).

surrounding the authority of the Court of Appeals to conduct its review in this manner (Petition, 20), and cites Alaska Industrial Board v. Chugach Electric Association, Inc., 356 U.S. 320, 324-25 (1958), to support her proposition that Ritenour and Lipsky were bound by the District Court's finding. Chugach, however, only held that the Supreme Court would not review a finding that a petition before the National Labor Relations Board had been timely filed. There is no language in that case warranting Petitioner's interpretation that in the absence of a cross-petition, Respondents are bound by a lower court's findings of fact. Indeed, even the law review article which Petitioner castigates for "compounding" the "confusion" (Petition, 20) properly

interpreted Chugach. See Stern, When to Cross-Appeal or Cross-Petition - Certainty or Confusion, 87 Harv. L. Rev. 763, 769 (1974). Petitioner herself argues that decisions subsequent to Langnes, supra, have clarified the rule. Helvering v. Pfeiffer, 302 U.S. 247 (1937); Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934). The Pfeiffer and Cosden decisions both reiterate the clear rule that when appellee has not cross-petitioned, he may not attack part of the adverse judgment, but may only be heard in support of favorable parts of the judgment. Pfeiffer, supra, at 250-51; Cosden, supra, at 487.

Additionally, by citing two inapposite Court of Appeals cases, Davis v. Murphy, 587 F.2d 362, 365 (7th Cir.

1978), and United States v. Ogilvie, 334 F.2d 837, 842 n.2 (7th Cir. 1964), cert. denied, 379 U.S. 984 (1965), Appellant fails to support her contention of uncertainty. In Davis, the Court of Appeals refused to award the higher attorney's fees urged by appellee's counsel who was dissatisfied with the award granted by the trial court. In other words, counsel sought to enlarge the judgment below.* The Davis decision is thus consonant with the Langnes rule and with Judge Friendly's opinion in this case (App. 42).

*The Davis Court said: "If counsel were dissatisfied with the district court award, he should have filed a cross-appeal in this court. Lacking such an appeal this court cannot review the district court's decision." Davis v. Murphy, supra, at 365 (emphasis supplied).

The general rule is stated as follows:

> "An appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court. But he cannot attack the decree with a view either to enlarging his own rights thereunder or to lessening the rights of his adversary unless he files a cross appeal, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below" (Wright, Law of Federal Courts, 468).

In this case Respondents, Ritenour and Lipsky, support the judgment of the District Court and are not attacking it. They do not seek to enlarge their rights in any way. Respondents are satisfied with the District Court's holding, and purposely did not appeal therefrom, especially from the "Conclusion of Law" (App. 74) affecting only Pepper.

The Ogilvie decision singularly

lacks any indication that appellee urged the reviewing court to overrule a finding below. The cited footnote, Ogilvie, supra, at 842 n.2, on the most generous reading, indicates only that the Court of Appeals felt that appellee had missed an important argument, and that it declined to consider the argument sua sponte.

The issue that Petitioner frames does not exist. Petitioner tries to create an issue by distinguishing between "findings of fact" and conclusions of law (Petition, 25-6). Only Petitioner, however, constrained to fabricate an argument to gain this Court's ear, has found it necessary to make this distinction. Not one case found even whispers of such differentiation; nor does Stern's article so concern itself. By making this uncalled

for distinction, Petitioner creates a "confusion" in Petitioner's mind alone,* one not shared by any Court of Appeals.

*Petitioner's confusion extends to counsel's erroneous reading of Stern, When to Cross-Appeal or Cross-Petition - Certainty or Confusion, 87 Harv. L. Rev. 763 (1974), and counsel's misreading of Judge Friendly's citation to that article. First, the article deals with a possible confusion concerning cross-appeals and cross-petitions to the Supreme Court. This, in fact, is the precise point evident in the selected quotation in Petition, 26. Stern argues that there is a difference between this Court's considerations of whether to grant certiorari and a Court of Appeals' review and that a different standard governs the Supreme Court's determination of whether to consider an issue not raised by cross-appeal or cross-petition.

Second, Judge Friendly did not rely in his decision on this article. Rather, he cited the article as general background material as is obvious by his use of the introductory signal, "see generally" (App. 41).

Since the Court of Appeals for the Second Circuit has correctly applied the Langnes rule, since all cases cited by Petitioner but Chugach, supra, hold steadfastly to the rule (and Chugach establishes one narrow, clear exception thereto), Petitioner has no warrant to urge this Court to grant certiorari. There is no confusion, uncertainty, or issue left unresolved. Petitioner's fabricated question affords no basis on which this Court should grant certiorari.

B. THIS COURT SHOULD DENY CERTIORARI IN THIS CASE BECAUSE NO BASIS EXISTS FOR PETITIONER'S CLAIM THAT THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT'S FINDING RESULTED IN DESTROYING THE INTEGRITY OF A JUDGMENT AGAINST ANOTHER PARTY.

Under its Conclusions of Law the District Court found as a secondary

basis for liability that Pepper was liable for concealing from his client that negotiations indicated Teleservice had a "probable corporate value of two to three million dollars" (App. 77). On the contrary, the Court of Appeals held that before purchasing Petitioner's Teleservice stock, Ritenour and Lipsky lacked knowledge that Teleservice could command a greater price than that proposed by Petitioner (App. 34). The Court of Appeals also scrutinized the record to ensure that overruling the District Court's finding would leave undisturbed each part of the District Court's judgment, including the judgment against Pepper (App. 42). Noting that the District Court had held Pepper liable principally on the ground that Pepper

had breached his fiduciary obligations as Petitioner's attorney by "falsely representing that Ritenour and Lipsky threatened to resign if they could not acquire a substantial interest in Teleservice", and, as provided in Petitioner's claim that Pepper "advised her that she had no choice but to sell" (App. 72), the Court of Appeals correctly concluded that breach was sufficient ground on which to base Pepper's liability. Pepper's false representations would support the judgment against him irrespective of whether anyone knew the value of Teleservice.

Petitioner argues that the Court's finding lack of knowledge necessarily unsettles the District Court's judgment against Pepper for misrepresentation. Petitioner fails to distinguish

between a fiduciary's liability for failure to disclose under Section 10(b) of the Securities Exchange Act of 1934 ("10(b)"), of which both Respondents and Pepper were absolved, and an attorney's liability for misrepresentation to his client under New York State law for which Pepper was held liable (App. 75-6).

Petitioner filed five claims in the District Court. Her First Claim relative to Pepper rested on Pepper's false statement that Ritenour and Lipsky had threatened to resign, and his advice that Petitioner had no choice but to sell. In other words, Pepper took unfair advantage of the attorney-client relationship between Petitioner and himself. The District Court incorporated this portion of the First Claim into the

Third Claim (App. 73-4). Petitioner's Third Claim named only Pepper and rested on Pepper's alleged breach of his fiduciary duty as discussed above. The District Court found Pepper liable for this claim on two distinct bases: (1) Misrepresenting that Respondents threatened to resign and advising Petitioner that she had no choice but to sell, and (2) Concealing what Pepper knew to be the true value of Teleservice (App. 75-6). The Court of Appeals correctly found that the first basis for the District Court's decision would remain inviolate even if the Court of Appeals overruled the District Court's conclusion that the true value of Teleservice was known to Pepper. It is submitted that the portion of the District Court's judgment against Pepper, premised upon

Pepper's breach of his attorney's fiduciary duty, is completely separate from the District Court's finding that Pepper had knowledge of value. As the Court of Appeals noted (App. 43 n.13), "New York Law imposes the highest level of fiduciary duty on all aspects of an attorney's dealings with his client. See Whitehead v. Kennedy, 69 N.Y. 462, 466 (1977)."

Petitioner's Fifth Claim named Pepper and Respondents and rested on their alleged violation of 10(b). The District Court dismissed this Claim as to all parties because Petitioner failed to prove reliance (App. 82). The Court of Appeals had no occasion to address Pepper's liability for the Fifth Claim because Petitioner failed to appeal the Pepper decision and, instead, settled with Pepper.

Although a finding of reliance and damage resulting therefrom are necessary elements to a 10(b) action, neither element need be proven in an action based upon the liability of a fiduciary for misuse of his office. It is well-settled in New York that "the only indispensable elements of a good cause of action ... are the fiduciary relationship and the use by one of the parties to it of the ... interest he acquired through it." Reis & Co. v. Volck, 151 App. Div. 613, 136 N.Y.S. 367, 370 (1st Dep't 1912). See also Munson v. Syracuse Geneva & Corning R.R. Co., 103 N.Y. 58, 74, 8 N.E. 355 (1886); Howard v. Murray, 43 N.Y. 2d 417, 372 N.E. 2d 568, 401 N.Y.S. 2d 781 (1977). The New York Courts also explicitly held the question of damages irrelevant

to this cause of action in Wendt v. Fischer, 243 N.Y. 439, 154 N.E. 303, 213 N.Y.S. 351 (1926) (Cardozo, J.); and Zeiden v. Oliphant, 54 N.Y.S. 2d 27 (Sup. Ct., N.Y. County 1945).

Therefore, since reliance and damage relate to Petitioner's Fifth Claim alone, and since the District Court held Pepper liable on Petitioner's Third Claim alone, it is submitted that the Court of Appeals' omission of any reliance or damage discussion was no oversight - but was the proper course to take. Petitioner's argument in this section of her Petition is entirely irrelevant.* See the Petition at

*In this section of her Petition, Petitioner also misstates the holding in Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191 (1937). Contrary to Petitioner's interpretation, Morley

27-30. The Court of Appeals' reversal of the District Court's finding of knowledge of value and implicit affirmance of that court's lack of reliance was logical and proper in all respects.

As demonstrated above, the integrity of the judgment against Pepper remains unblemished; but this does not lead, as Petitioner would have it, to the conclusion that the Court of Appeals consequently incorrectly affirmed the judgment in favor of Ritenour and Lipsky (Petition, 31). The cases

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contains no language either implying or expressing that "the failure to file a cross-appeal indicates satisfaction with the judgment below" (Petition, 31). Rather, the Morley Court held that an appellee not taking a cross-appeal cannot be heard to complain "except in support of the decree from which the appeal of the other party is taken." Morley, supra, at 192.

on which Petitioner relies actually lend further support to the Court of Appeals' affirmation. All three cases decided that before a person could be held liable for a third party's breach of fiduciary duty, that person must "knowingly join" the fiduciary in pursuing the illegal course of action. Crites, Inc. v. Prudential Insurance Co., 322 U.S. 408, 414 (1944); Jackson v. Smith, 254 U.S. 586, 589 (1921); Irving Trust Co. v. Deutsch, 73 F.2d 121, 125, cert. denied, 294 U.S. 709 (1934). In each of these cases, the act that constituted the breach of fiduciary duty was the same act in which the non-fiduciary joined. In the present case, the acts that constituted Pepper's breach of fiduciary duty were his advice and misrepresentations to Petitioner regarding Ritenour and Lipsky's

"threatened" resignations. The record is clear that Ritenour and Lipsky completely disassociated themselves from such acts.

Petitioner overlooks the point that both the District Court and the Court of Appeals found that Ritenour and Lipsky completely disassociated themselves from Pepper's misrepresentations; indeed, they attempted to prevent Pepper from continuing those misrepresentations, and expressly denied Pepper's assertions directly to Petitioner (App. 49 and 73). These are not the actions of men who "knowingly join" a fiduciary in his breach. Petitioner's argument here is a thinly veiled attempt to reassert the conspiracy theory that the Court of Appeals expressly rejected because "the District Court's findings present an insuperable obstacle to [that]

theor[y]" (App. 50).

C. NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS REGARDING THE CONSEQUENCES OF A PARTY'S FAILURE TO RAISE IN ITS BRIEF AN ISSUE FOR REVIEW.

Rule 28 of the Federal Rules of Appellate Procedure serves two purposes: to advise the opposing party of the issues for which it must prepare, and to lighten the burden of review for the Courts of Appeals. F.R.A.P. Rule 28 U.S.C.A., citing Thys Co. v. Anglo California National Bank, 219 F.2d 131, 133, cert. denied, 349 U.S. 946, (1955); Iva Ikuko Toguri d'Aquino v. United States, 192 F.2d 338, 348, cert. denied, 343 U.S. 935 (1952). Except when injustice would accrue from inadherence, the dictates of the Rule are not inflexible. Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, cert. denied, 394

U.S. 1012 (1969). Indeed, Rule 2 of the Federal Rules of Appellate Procedure provides in part:

> "In the interest of expediting decision, or for other good cause shown, a court of appeals may . . . suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion . . . ."

The Court of Appeals in the present case properly exercised its discretion explicitly permitted by the Rules. In so doing, the Court of Appeals took meticulous care that Petitioner's interests were safeguarded. Before questioning the District Court's conclusion, the Court noted that the parties had full opportunity below to develop the relevant facts (App. 44-5). Before deciding the issue, the Court invited the parties to submit supplemental briefs on the issue. Indeed three full

sets of briefs were before the Court of Appeals. Before deciding the case, the Court fully considered Petitioner's supplementary conspiracy theory of liability (App. 46-7).

Petitioner cites Brown v. Sielaff, 474 F.2d 826, 828 (3d Cir. 1973), for the proposition that F.R.A.P. 28 is absolute. In that case, however, the court declined to consider, sua sponte, an omitted issue, not only because appellant had neglected to raise the issue, in brief or otherwise, but also because the court would not have disturbed the finding below even if the appellant had properly raised the issue on appeal. The distinction to be noted here is that Brown involved the failure of an appellant seeking to overturn a lower court judgment, not an appellee seeking to uphold a judgment below.

Nor does Pedicord v. Swenson, 431 F.2d 92, 93 (8th Cir. 1970), require a reviewing court to find "'exceptional circumstances' before the issue can be considered" as Petitioner argues (Petition, 36). In language subsequent to the quoted phrase the Court explains that at some point, not necessarily in a brief, someone must raise the issue. In the Court's words, "[q]uestions not raised, briefed or argued will ordinarily be given no consideration by an appellate court." Id. Additionally, in Pedicord as in Brown, the omission of the issue was a failure on the part of an appellant seeking to overturn part of the lower court's judgment.

By reading F.R.A.P. Rule 28 as containing prohibitions binding a Court of Appeals, rather than as containing rules governing parties to an appeal, Petitioner

has conjured a non-existing conflict. 9 Moore's Federal Practice ¶228.02[2.-2] states: "It is of great importance that the appellant raise in his initial brief all the issues he wishes to raise on appeal because normally the court will not consider issues that are not so raised and argued." Carried to its logical conclusion, Petitioner's argument would destroy a Court of Appeals' power and discretion of review.

In light of the procedural due process purpose of F.R.A.P. Rule 28, the meticulous care of the Court of Appeals herein to ensure fairness and full opportunity to be heard, and Petitioner's utter failure to demonstrate conflict among the Courts of Appeals' decisions concerning the Rule, this Court ought not grant certiorari.

POINT TWO

THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI SINCE ALL DECISIONS OF THE COURTS OF APPEALS ACCORD IN HOLDING THAT PURSUANT TO SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 INSIDERS HAVE A DUTY TO DISCLOSE TO STOCKHOLDERS FROM WHOM THEY PURCHASE STOCK ALL MATERIAL INFORMATION, AND THAT MATERIALITY IS GOVERNED BY A REASONABLE MAN STANDARD THAT MUST BE APPLIED TO THE CIRCUMSTANCES OF EACH CASE.

A. THE COURT OF APPEALS' DECISION IS CONSONANT WITH OTHER COURTS OF APPEALS THAT HAVE CONSIDERED THE DISCLOSURE DUTY OF INSIDERS WHO PURCHASE STOCK FROM THEIR CORPORATION'S STOCKHOLDERS.

After reviewing the record below, the Court of Appeals expressed concern that one of the findings of the District Court was unsupported by the record. The Court thereupon solicited from both parties supplementary briefs to clarify the question of whether Ritenour and Lipsky knew that Teleservice was worth more than the price

secured by Petitioner when she sold her stock to them. After studying the supplementary briefs, the Court concluded that Ritenour and Lipsky had no such knowledge (App. 34-5,39). Since Ritenour and Lipsky could not have believed that "Teleservice's value might far exceed the $20 per share [Petitioner] had been willing to accept from the [Stat] syndicate," such value was not a material fact known to them which they should therefor have disclosed to Petitioner.

All Courts of Appeals agree. The test for determining the materiality of information is "whether 'a reasonable man would attach importance [to the fact not disclosed] in determining his choice of action in the transaction in question.'" Rogen v. Ilikon Corp., 361 F.2d 260, 266 (1st Cir. 1966) [quoting Restatement,

Torts, § 538(2)(a)]. See also the cases cited in Petitioner's Brief at 38: Holmes v. Bateson, 583 F.2d 542, 557 (1st Cir. 1978); Thomas v. Duralite Co., 524 F.2d 577, 585 (3d Cir. 1975); Rochez Bros. Inc. v. Rhoades, 491 F.2d 402, 408 (3d Cir. 1974).

Petitioner asserts that the "existence and status of merger discussions - no matter how tentative or preliminary" are material facts (Petition, 39). Contrary to Petitioner's assertion, each of the foregoing cases held that, under the particular circumstances before the court, the negotiations constituted material facts. Petitioner has failed to distinguish between the reasonable man standard enunciated in the above-cited cases, and the application of that standard to the facts. If Petitioner's suggestion that nascent

negotiations are material per se were carried to its logical conclusion, then the vaguest explorations would require reporting to the stockholders, and the private cause of action under Section 10(b) would be transformed into an enforcement mechanism. [See Dupuy v. Dupuy, 551 F.2d 1005, 1016, (5th Cir. 1977), cert. denied, 434 U.S. 911 (1978), which rejected this approach on grounds that a 10(b) private action was held by this Court to be a compensatory device. J. I. Case Co. v. Borak, 377 U.S. 426, 432-35 (1964)].

In support of Petitioner's contention that the holding of the United States Court of Appeals in this case is in conflict "with that of every other Court of Appeals" (Petition, 38) Petitioner cites four cases each of which follows the general rule and is

distinguishable from this case on the facts.

The first case relied upon by the Petitioner is Holmes v. Bateson, 583 F.2d 542 (1st Cir. 1978). Holmes involved a sale of stock to insiders by the Executors of the estate of a former president of the corporation. The District Court found that the Holmes case was "primarily one of non-disclosure" in that the defendants had failed to reveal to the estate certain financial figures reflecting the true value of the business and details of negotiations for acquisition. The opinion of the Court of Appeals in Holmes quoted the District Court's finding that the defendants had "painted a black picture and made negative remarks and that they contributed to the estate's misapprehension of [the company's] true

financial condition," Id. at 555. The District Court in Holmes applied the well-settled rule and found that under the facts of the case the omissions and misrepresentations were "material omissions" within the meaning of Section 10(b), under the reasonable man test.

> "As we have indicated, we think that the district court correctly analyzed the entire picture and its findings of material omissions and selective disclosures were based on the fact that information given to the estate was purposely incomplete, and inaccurate" (emphasis supplied). Id. at 558.

The facts in Holmes, unlike the facts in the instant case, clearly established that the defendants were aware of a serious offer to acquire the company which pre-dated the closing of the sale of the estate's holdings in the company.

The second case cited by

Petitioner in support of her contention that the holding in this case is in conflict with the general rule in a 10(b) case is Rochez Bros., Inc. v. Rhoades, 491 F.2d 402 (1974). Rochez involved a sale of stock by one 50% stockholder in the corporation to an insider who was the corporation's other 50% stockholder.

According to the Petitioner, Rochez is the "clearest example of a decision in direct conflict with that of the Court of Appeals herein" (Petition, 40). A careful reading of Rochez indicates that the District Court applied the general rule in finding that the insider's failure to disclose his hiring of a business broker to find a purchaser for the company prior to the insider's purchase of stock was a material fact

under the reasonable man standard.

The record in Rochez unlike the record in the instant case, paints a clear picture of omissions calculated to keep the selling shareholder in the dark, including testimony by the business broker that "[w]hen he [the insider] took me by to meet [the selling shareholder], he asked me not to tell them what we were talking about" Rochez, supra, at 408 n.9. Furthermore, the defendant admitted that he never told the plaintiff about his hiring of the business broker.

The Court of Appeals in Rochez unequivocally rejected the Petitioner's contention that any discussions relating to merger negotiations are, per se material. Rochez did not so hold nor has Petitioner cited any case that has so held.

Prior to addressing the defendant's arguments in Rochez that the District Court's findings with respect to materiality were erroneous, the Court of Appeals set down an unambiguous yardstick by which it would measure the facts to determine their materiality. The Court of Appeals stated:

> "We must, therefore, review the record to determine if the district court's finding that defendant was engaged in negotiations with Simmonds and Carus for the sale of MS&R, and that these negotiations had reached a stage where their existence and contents were material, is clearly erroneous" (emphasis supplied). Id. at 408.

Clearly, the Court of Appeals in Rochez recognized that not all merger negotiations are material as a matter of law.

Rochez, upon which Petitioner relies so heavily, is a case which clearly rejects the Petitioner's

contention that all merger negotiations are, per se, material and supports the general rule that the test of materiality is an objective one -- the reasonable man test.

The final two cases cited by the Petitioner in support of her contention that the element of materiality in a 10(b) case is not to be determined by the general rule under the reasonable man standard are Thomas v. Duralite, 524 F.2d 577 (1975) and Childs v. RIC Group, Inc., 331 F. Supp. 1078 (N.D. Ga. 1970), aff'd, 447 F.2d 1407 (5th Cir. 1971).

In Thomas the District Court found that insiders misrepresented a turn-around in the corporate financial position and failed to disclose merger negotiations. The trial judge concluded that had the plaintiff been aware of the company's improved health, he would not

have agreed to sell his stock at the price he did.

It is interesting to note that the court in Thomas recited the general rule relating to the test of materiality and cited Rochez as one of its authorities for the general rule. The Court stated:

> "Generally speaking, the test of materiality is an objective one -- that is, whether a reasonable man would attach importance to the particular facts in controversy. See Rochez Bros., Inc. v. Rhoades, supra; Landy v. Federal Deposit Insurance Corporation, 486 F. 2d 139 (3d Cir. 1973), cert. denied, 416 U.S. 960, 94 S. Ct. 1979, 40 L. Ed 2d 312 (1974); List v. Fashion Park, Inc., 340 F. 2d 457 (2d Cir.), cert. denied, 382 U.S. 811, 86 S. Ct. 23, 15 L. Ed. 2d 60 (1965)." Thomas, supra, at 584.

In discussing the trial judge's assessment of the "importance" [read materiality] of the insider's

discussions concerning a merger, the Court of Appeals in Thomas pointed out that:

> ".... the trial judge emphasized the distinction between the hopes for imminent acquisition by Giffen and the initial executive ruminations cited in Harnett v. Ryan Homes, Inc., supra." Thomas, supra, at 584-85.

Childs was an action for breach of contract brought by corporate insiders (who had previously acquired 100% ownership of the corporation from other shareholders) who moved for summary judgment against a potential merger partner that refused to consummate the merger. The defendant in Childs made an offer to acquire the company prior to the insiders' negotiations with the company's other shareholders for their stock.

Judicial relief was denied to the insiders in Childs because the

District Court found that they had, by their own admission, not disclosed to selling shareholders the fact that negotiations with the defendant were in progress or that acquisition offers had been made prior to the insiders' acquisition of other shareholder's holdings. Furthermore, the record in Childs indicated that the defendants declined to consummate the merger because the insiders refused to confirm that they had disclosed the defendant's offer to the shareholders from whom the insiders acquired their stock. Unlike the instant case, proof of the omission of a material fact was so clear and incontrovertible that the District Court granted defendants' motion for summary judgment upon the theory that the plaintiffs should not gain by their own

wrongdoing. The insiders in Childs admitted that they did not disclose to the shareholders from whom they acquired stock that negotiations with the defendant suitor were in progress or that acquisition offers had been made.

CONCLUSION

This Court should deny the Petitioner's Petition for Certiorari since the Court of Appeals (1) had the power to review the entire record in sustaining the judgment of the District Court, which the Respondents support and (2) no conflict exists between the decision of the Court of Appeals in this case and the applicable decisions of this Court or with any other Court of Appeals concerning the application of Section 10(b) of the Securities Exchange Act of 1934. All courts are in agreement that insiders have a duty to disclose to stockholders from whom they purchase stock all material information and that materiality is a question of fact, governed by the

reasonable man standard and determined by the circumstances of each case.

Respectfully submitted,

RAYMOND P. O'KEEFE
CHARLES A. SCHARF
GEORGE C. BECK
CHARLES A. SCHARF, P.C.
60 East 42nd Street
New York, New York 10017
(212) 986-4141

Counsel for Respondents